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Nos. 95-1478 & 95-1563 (Consolidated)

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In the Supreme Court of the United States

OCTOBER TERM, 1996

JAY PRINTZ, SHERIFF/CORONER,
RAVALLI COUNTY, MONTANA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SHERIFF RICHARD MACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF HANDGUN CONTROL, INC., CENTER TO PREVENT HANDGUN VIOLENCE, THE UNITED STATES CONFERENCE OF MAYORS, FEDERAL LAW ENFORCEMENT OFFICERS' ASSOCIATION, FRATERNAL ORDER OF POLICE, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, MAJOR CITIES CHIEFS, NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES, NATIONAL TROOPERS' COALITION, AND POLICE EXECUTIVE RESEARCH FORUM AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

In executing its power to regulate commerce, may Congress impose ministerial duties on state officials?

If so, does Congress have the authority to enact the portion of the Brady Act that requires local law enforcement officers, on an interim basis, to make a reasonable effort to review records relating to prospective handgun purchasers?

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The *amici* submitting this brief consist of eight national law enforcement organizations and the U.S. Conference of Mayors, together with Handgun Control, Inc. and the Center to Prevent Handgun Violence, sister organizations chaired by Sarah Brady. The law enforcement *amici* represent hundreds of thousands of law enforcement officers who face the daily threat of handgun violence and who rely upon the Brady Act in the ongoing war against violent crime. The membership of the law enforcement *amici* includes police executives who are subject to the Brady Act requirement that they conduct reasonable background checks on handgun buyers. The U.S. Conference of Mayors represents municipal governments serving populations of 30,000 and more. The members of the Conference are concerned with promoting both public safety and an appropriate distribution of local, state and federal authority. All of the *amici* are committed to preventing handgun violence and to keeping violent criminals and other prohibited persons from purchasing handguns.

STATEMENT OF THE CASE

The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (hereinafter "Brady Act" or "the Act"), was enacted amidst "an epidemic of gun violence." *See* H.R. Rep. No. 103-344, at 8 (1993), *reprinted* in 1993 U.S.C.C.A.N. 1984, 1985. The Act's legislative history recounts the following chilling statistics: 15,377 Americans were murdered with firearms in 1992; 12,489 of these murders were committed with handguns; and handgun murders in the United States increased by 41 percent between 1988 and 1992. *Id.* In 1993, handguns were used to commit 881,000 violent crimes. Craig A. Perkins et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Criminal Victimization in the United States, 1993*, at 72 (1996).

The retail market makes handguns widely available. Federally licensed firearms dealers sell an estimated 3.5

million handguns each year.[1] Since 1968, federal law has prohibited these dealers from selling handguns to convicted felons and other prohibited purchasers. 18 U.S.C. § 922(d). Before enactment of the Brady Act, however, compliance with this prohibition depended on an honor system. The buyer completed a federal form on which he swore under penalty of perjury that he was not a convicted felon nor a member of any other prohibited class. But unless a state or local law required that a background check be performed, no one confirmed that the buyer was telling the truth. As a result, a convicted murderer or rapist willing to lie about his criminal history could easily and immediately purchase a deadly handgun.

The Brady Act "give[s] the law enforcement community a very valuable and effective tool" to cut off criminals and other dangerous persons from the retail market.[2] The Act's interim provisions—the subject of petitioners' challenge—require that the "chief law enforcement officer" ("CLEO") in each jurisdiction "make a reasonable effort to ascertain . . . whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law." 18 U.S.C. § 922(s)(2).[3] This requirement reflects Congress' considered and reasonable judgment that, during the interim period, the CLEOs' access to state records and personal knowledge of their communities make them "best able to determine if the individual is disquali-

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[1] Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of the Treasury, "Guns for Sale In U.S.," ATF Facts 2 (Nov. 1994); *see also* Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of the Treasury, *One-Year Progress Report: Brady Handgun Violence Prevention Act* 2 (1995).

[2] *Brady Handgun Violence Prevention Act: Hearing on H.R. 1025 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. 196 (1993) (statement of Tim Mullaney, Commander, Criminal Investigations Unit, Dover Del., and Member, Fraternal Order of Police) (hereinafter "Hearing on H.R. 1025"); *see also* H.R. Rep. No. 103-344, at 9.

[3] The Act defines "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. § 922(s)(8).

fied to own a handgun."[4] The Act provides CLEOs with the information and time necessary for the check by requiring that a prospective purchaser complete a federal form, that the firearms dealer forward the form to the designated CLEO, and that there be a five business day waiting period. 18 U.S.C. § 922(s)(1)(A).

A handgun purchase may go forward if the CLEO notifies the dealer that a check has indicated that the prospective purchase would be legal, or if the five business day waiting period lapses without the CLEO providing notice that the purchase would be illegal. *See* 18 U.S.C. § 922 (s)(1)(A)(ii)(I) and (II). Conversely, if the CLEO concludes that the sale to the prospective purchaser would be illegal and so informs the dealer within five days, the dealer will not complete the sale. A person whose purchase has been blocked may request that the CLEO provide a written explanation for the determination. 18 U.S.C. § 922(s)(7).

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[4] H.R. Rep. No. 101-691, at 11 (1990); *see also id.* at 10 (CLEOs' specialized knowledge is central to the interim provisions of the statute); Letter from Attorney General Reno to Rep. Charles Schumer (Nov. 9, 1993) ("Background checks performed by local police remain the most effective means of screening out ineligible handgun buyers. It is local law enforcement who best know the residents and residences within their communities."); *Waiting Period Before the Sale, Delivery or Transfer of a Handgun: Hearings on H.R. 975 and H.R. 155 Before the Subcomm. on Crime of the Comm. on the Judiciary*, 100th Cong. 356 (1987 & 1988) (testimony of Dewey Stokes, Nat'l Pres., Fraternal Order of Police, Columbus, Ohio) (hereinafter "Hearings on H.R. 975 and H.R. 155").

Many state criminal history records were either insufficiently computerized or otherwise unavailable to the Federal Government: "only 21 States now share their [criminal history] data with the FBI," and "several States do not even have their records on computer." 137 Cong. Rec. S8945-46 (daily ed. June 27, 1991) (statement of Sen. Mitchell); *see also Hearing on H.R. 1025*, at 89 (testimony of Asst. Attorney General Acheson) ("[L]ocal law enforcement has the advantage, which the FBI does not, of in many instances having physical records . . . .").

Under the Act's permanent provisions, the waiting period will be replaced, on or before November 30, 1998, by a national instant criminal background check to be developed and maintained by the United States Department of Justice. Brady Act § 103(b). This national system will consist of a computerized database that firearms dealers must contact to determine if a handgun purchase would violate the law. *Id.* The Act authorizes $200,000,000 in grants to assist States in the computerization of their criminal records as part of the implementation of the national instant check system. Brady Act § 106(b). By the close of the interim period, CLEOs will have no responsibilities under the Act. 18 U.S.C. § 922(t).

The Brady Act has succeeded in helping to prevent felons and other dangerous persons from obtaining handguns through the retail market. A recent study concludes that the Brady Act's background check requirement has prevented over 100,000 prohibited purchasers, including over 72,000 felons, from obtaining handguns from federally licensed dealers.[5] As the study notes, these numbers understate the Act's effect, as the threat of a background check deters many prohibited purchasers from even attempting to make a retail handgun purchase.

SUMMARY OF THE ARGUMENT

The Brady Act is a valid exercise of the powers granted Congress by the Commerce Clause. The Court "has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers," *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991), and thus has upheld legislation even if it "in effect directed state decisionmakers to take or to refrain from taking certain actions." *FERC v. Mississippi*,

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[5] *See* Douglas S. Weil, Center to Prevent Handgun Violence, *Denying Handguns to Prohibited Purchasers: Quantifying the Impact of the Brady Law* 6 (Aug. 16, 1996); *see also* Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of the Treasury, *One-Year Progress Report: Brady Handgun Violence Prevention Act* (1995).

456 U.S. 742, 762 (1982) (collecting cases). The Court will strike down only those federal enactments that: (1) breach the "etiquette of federalism" by commandeering the state legislature or by overburdening state officials, *see United States v. Lopez*, 115 S. Ct. 1624, 1639 (1995) (Kennedy, J., concurring); or (2) cause a breakdown in the political process by preventing political accountability. *See New York v. United States*, 505 U.S. 144, 168-69 (1992).

The Brady Act does not violate the etiquette of federalism. Unlike the statute at issue in *New York*, the Act does not commandeer the States' legislative or regulatory processes. Instead, the Act merely imposes limited, ministerial duties on state officials. Petitioners' view that such minimal burdens violate the Tenth Amendment is "fundamentally incompatible with more than a century of constitutional development." *Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987), overruling *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860). The Court historically has upheld federal statutes that imposed duties on state officials.

The Brady Act also does not cause a breakdown in the political process by preventing political accountability. Unlike *New York*, this is not a case where the Federal Government has obscured its role by requiring intermediate state legislation. Instead, citizens are governed directly by federal law. The Act directly requires that prospective handgun purchasers fill out a federal form, and it is the Brady Act alone that makes them wait for a maximum of five business days while their background is checked. Moreover, the Act has been one of the most well-publicized federal enactments in recent history. Because federal officials have not "remained insulated from the electoral ramifications of their decision," *New York*, 505 U.S. at 169, there is no need for this Court to intervene to protect the political process.

The Brady Act is also consistent with the Framers' vision of federal-state relations. As Alexander Hamilton explained, the federal government "must itself be empowered to employ the arm of the ordinary magistrate to

execute its own resolutions." *The Federalist No. 16*, at 165 (Hamilton) (Benjamin Fletcher Wright ed., 1961). The Framers anticipated federal use of state officials, and early Congresses—including the Congress that adopted the Tenth Amendment—passed legislation that imposed ministerial duties on state officials.

If this Court, nevertheless, strikes down a portion of the Brady Act, it should find that the remaining portions are severable. Even if background checks are no longer mandatory, the remaining provisions of the Act would provide law enforcement with the oportunity to perform background checks. The law enforcement community, including members of the *amici* organizations, would readily make use of such an opportunity. Petitioners have not met, and cannot meet, their burden of demonstrating that a Congress concerned with an "epidemic of handgun violence" would have preferred no checks to voluntary ones.

ARGUMENT

I. THE BRADY ACT IS FULLY CONSISTENT WITH THE PRINCIPLES OF FEDERALISM EMBODIED IN THE CONSTITUTION.

The Brady Act's imposition of minimal duties on state officials does not violate constitutional principles of federalism. Petitioners' extreme view of those principles would undermine Congress' Commerce Clause powers and embroil the courts in regulating the complex interactions between federal and state governments.[6] In contrast,

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[6] Congress is granted plenary power under the Commerce Clause to regulate interstate commerce. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824); *see also Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 276 (1981) ("Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress."). Federal legislation directly regulating the sale of handguns easily falls within the scope of that power. *Mack v. United States*, 66 F.3d 1025, 1028 (9th Cir. 1995). The Brady Act is a necessary and proper exercise of Congress' Commerce Clause power. *See* U.S. Const. art. I, § 8, cl. 18; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415, 421 (1819); *supra* at 2-3 and *infra* at 18 (describing Congress' reasons for using CLEOs during the interim period).

this Court "has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers." *Gregory*, 501 U.S. at 464; *cf. United States v. Lopez*, 115 S. Ct. 1624, 1639 (1995) (Kennedy, J., concurring) ("Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.").[7]

Consistent with the scope of congressional power and the role of the political process, "the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." *FERC*, 456 U.S. at 762. The Court will strike down a federal enactment only if it: (1) violates the etiquette of federalism by commandeering the state legislature or overburdening state officials; or (2) causes a breakdown in the political process by preventing political accountability.[8] The Brady Act's limited and narrowly tailored imposition of ministerial duties on state officials implicates neither of these concerns. The Act instead is a valid product of the political and legislative process.[9]

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[7] As a result, the Court has sustained a Tenth Amendment challege to a congressional exercise of the Commerce Clause power only twice since the demise of the *Lochner* era—and the Court subsequently overruled one of those two cases. *See New York*, 505 U.S. 144; *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

[8] Of course, a federal statute that was itself a product of a breakdown in the political process also would be unconstitutional. *See South Carolina v. Baker*, 485 U.S. 505, 513 (1988) ("Although Garcia left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, ... [w]here, as here, the national political process did not operate in a defective manner, the Tenth Amendment is not implicated.").

[9] Petitioners assert no claim that the Brady Act violates the Second Amendment to the Constitution, nor could they. In *United States v. Miller*, 307 U.S. 174, 178 (1939), this Court determined that the Second Amendment guarantee was made "[w]ith obvious purpose to assure the continuation and render possible the effectiveness" of state militias and "must be interpreted and applied with

A. The Brady Act Is Consistent With the Etiquette of Federalism Because It Does Not Commandeer State Legislatures Nor Overburden State Officials.

The "etiquette of federalism" requires that the national government respect the federal structure of our constitutional system. *Lopez*, 115 S. Ct. at 1642 (Kennedy, J., concurring). Such etiquette is the embodiment of important norms through both formal rules and a nuanced analysis of appropriate burdens. The rules of the etiquette of federalism simply forbid "a formal command from the National Government directing the State to enact a certain policy, or to organize its governmental functions in a certain way." *Id.* (citations omitted). The reason for this rule against federal commandeering of state policy-making was set forth by this Court in *FERC*:

> [H]aving the power to make decisions and to set policy is what gives the State its sovereign nature. It would follow that the ability of a state legislative (or, as here, administrative) body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system.

456 U.S. at 761 (citations omitted). Federal statutes that force a State to take action as a sovereign "endanger the 'separate and independent existence' " of States within the constitutional system, *United Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678, 690 (1982) (citation omitted), and so violate the Tenth Amendment. *See*

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that end in view." *Accord Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (finding that legislative restrictions on firearms issues do not "trench upon any constitutionally protected liberties" and quoting *Miller* for the proposition that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.' " (citation omitted)); *see also Burton v. Sills*, 248 A.2d 521 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969). In no conceivable way does the Brady Act affect the bearing of arms by a state militia. *Cf. Perpich v. Department of Defense*, 496 U.S. 334, 348 (1990) (noting equivalence between the National Guard and the militia).

New York, 505 U.S. 144; *Coyle v. Smith*, 221 U.S. 559 (1911).

The legislative scheme under review in *New York* [10] did not respect the federal structure established by the Constitution because it would "require the States to govern according to Congress' instructions," 505 U.S. at 162, "command state legislatures to legislate," *id.* at 179, "'commandeer[] the legislative processes,'" *id.* at 176 (quoting *Hodel*, 452 U.S. at 288), and "command a state government to enact *state* regulation," *id.* at 178. Such commandeering of state legislatures is inimical to the etiquette of federalism established by the Framers, who explicitly rejected a system in which the Federal Government would act through "'intermediate legislations'" passed by the States. *Id.* at 163-66 (quoting *The Federalist No. 16*, at 165 (Hamilton)).[11]

The Brady Act does not violate the etiquette of federalism. It does not "command state legislatures to legislate"

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[10] The Court's opinion in *New York* focused, in relevant part, on the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LLRWPA"). Under that provision, a State was required to either (1) regulate radioactive waste according to a federal formula or, (2) take title of all waste generated within its borders, which inevitably would require that the State develop a legislative or regulatory program to deal with disposal of the waste. *See New York*, 505 U.S. at 175. The Court held that both alternatives were unconstitutional, because either way, 'the Act commandeers the *legislative processes* of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 176 (quoting *Hodel*, 452 U.S. at 288 (emphasis added)).

[11] Petitioners' erroneously broad reading of *New York* is based principally on the Court's use of the term "administer" at two points in its opinion. *See, e.g.*, Printz Brief at 16, 23; Mack Brief at 28. The decision as a whole, as well as the particular contexts in which the term was used, belie Petitioners' broad interpretation. *New York* was concerned with a federal directive to the States to enact legislation or develop a regulatory program to address the disposal of radioactive waste. In context, "administer" describes the creation of state policy by an administrative agency—not the ministerial implementation of a federal program. *See* 505 U.S. at 176-77, 188.

or otherwise require intermediate legislation. Instead, the Act governs citizens directly. Since States are not required under the Act to make state law, either through the legislative or the administrative process, the Act does not infringe on the "power of making rules or laws to govern" that is "the essence of sovereignty."[12] As the Ninth Circuit correctly noted, the Court in *New York* "was concerned with a federal intrusion on the States of a different kind and much greater magnitude than any involved in the Brady Act." *Mack*, 66 F.3d at 1030.

Federal action also can violate the etiquette of federalism by imposing burdens on state officials that are heavy enough to disrupt the States' "separate and inedependent existence."[13] The minimal duties imposed by the Brady Act, however, do not create such a burden. *See Frank*, 78 F.3d at 831; *Mack*, 66 F.3d at 1031. A CLEO must make only "a reasonable effort" to determine whether the proposed purchase is lawful. 18 U.S.C. § 922(s)(2). This affords the CLEO discretion to tailor background checks to local conditions and resources.[14] Furthermore, the records review of the background check is like a num-

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[12] *The Fallacies of the Freeman Detected by a Farmer* (1788), *reprinted in* 3 *The Complete Anti-Federalist* 183 (Herbert J. Storing ed., 1981); *see also FERC*, 456 U.S. at 761; *Thompson v. Oklahoma*, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting) (States' legislative processes are the "heart of their sovereignty").

[13] *See Mack*, 66 F.3d at 1032 ("[T]here is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment."); *see also Frank v. United States*, 78 F.3d 815, 830-31 (2d Cir. 1996).

[14] *See also* Open Letter to State and Local Law Enforcement Officials from John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms, U.S. Dep't of Justice 10 (Jan. 21, 1994) (recognizing that each law enforcement agency would "set it [sic] own standards" for its efforts, "based on its own circumstances, *i.e.*, the availability of resources, access to records and taking into account the law enforcement priorities of the jurisdiction"). Regulations implementing the Act also offer States flexibility in designating the CLEO for a particular area. *See Frank*, 78 F.3d at 825-26, 830-31.

ber of other background checks routinely handled by CLEOs for a range of purposes. *See Mack*, 66 F.3d at 1031; *see also FERC*, 456 U.S. at 760.[15]

Similarly, the requirement that CLEOs destroy documents or records received or generated as a result of the background check, 18 U.S.C. § 922(s)(6)(B)(i), and provide persons precluded from purchasing a handgun a written statement of explanation, if requested to do so, 18 U.S.C. § 922(s)(6)(C), are *de minimis*. Petitioner Mack's own testimony demonstrates that he met these obligations with ease.[16] The *de minimis* character of the Act's burdens should "end, rather than begin, the Court's constitutional inquiry." *South Carolina v. Baker*, 485 U.S. 505, 529 (1988) (Rehnquist, C.J., concurring); *see also infra* at 13-14 (discussing federal statutes upheld by the Court that imposed more onerous burdens on state officials).[17]

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[15] *See, e.g.*, Hearings on H.R. 975 and H.R. 155, at 118-19 (statement of Darwin McGlumphy, First Vice President, Ohio Union of Patrolmens Ass'n). Although Petitioners go to great lengths to make the obligation look as complicated and onerous as possible, these checks require only that the CLEOS apply straightforward criteria in a way they deem "reasonable." *See* 18 U.S.C. § 922(s)(2). The checks require far less discernment than tasks routinely required of law enforcement officers, such as determining whether a crime has been committed or whether a warrant is required under the Fourth Amendment.

[16] Petitioner Mack explained that "[m]y secretary keeps all the files and I just remind her from time to time that the files are to be destroyed after 20 days." Transcript of Proceeding at 9 (May 31, 1994). Similarly, in the three months during which Sheriff Mack conducted background checks, only one potential purchaser sought an explanation, and it appears that this request was met with a simple oral explanation. *See* Mack Petition App. at 65; Transcript of Proceeding at 7.

[17] Not only does the Act cost States relatively little, *see* H.R. Rep. No. 103-344, at 23-24 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 2000-01 (reprinting Congressional Budget Office Cost Estimate), but it also authorizes the appropriation of $200 million to the States to, among other things, improve their computerized criminal history records. *See* Brady Act § 106(b). Such fund-

In light of the minimal burdens imposed by the Brady Act, Petitioners are forced to argue that the Tenth Amendment bars the imposition of any federal duty on a state official. This Court has already considered and rejected such a categorical rule. Over a century ago, on the eve of the Civil War, the Court stated that Congress:

> has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State.

Dennison, 65 U.S. (24 How.) at 107, *overruled by Branstad*, 483 U.S. 219.[18] This view of federalism, however, was recently and emphatically rejected by this Court as "the product of another time," and as "fundamentally incompatible with more than a century of constitutional development." *Branstad*, 483 U.S. at 230; *see also FERC*, 456 U.S. at 761-62.

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ing demonstrates that "the national political process systematically protects States from the risk of having their functions in th[is] area handicapped by Commerce Clause regulation." *Garcia*, 469 U.S. at 555; *see also FERC*, 456 U.S. at 770 n.33 (Congress' "steps to reduce or eliminate the economic burden of compliance" will help a statute survive Tenth Amendment scrutiny.).

[18] Petitioners' view of the limits on federal power is similarly broad. Petitioners maintain that even the smallest federal imposition is unconstitutional. *See, e.g.*, Printz Brief at 22 (no *de minimis* exception, regardless of federal interest); *id.* at 25 (arguing that Congress may not require States to report missing children to a central database). The rationale offered for this position is strikingly similar to the *Dennison* standard quoted above. *See, e.g.*, NRA Amicus Brief at 7 (if the Federal Government can impose any duty on state officials, "the states will eventually be robbed of their funds, their resources and their independence; a pattern that will ultimately result in the destruction of federalism"). This apocalyptic view ignores the ability of the political process to protect the federal structure. *See Garcia*, 469 U.S. at 553 (noting that the political system has worked to provide States significant funding from the Federal Government); Unfunded Mandates Reform Act of 1995, 2 U.S.C.A. §§ 1501-1571 (West Supp. 1996) (protecting States from costly federal mandates).

Since *Dennison*, the Court repeatedly has recognized that valid acts of Congress may alter the duties and obligations of state and local officials under state law;[19] may alter the States' independent policy choices;[20] and may impose financial burdens on the States.[21] For example, the Court has upheld federal legislation requiring that state officials "consider" adopting specific "rate design" and regulatory standards, follow defined procedures when doing so, and make publicly available a written statement of reasons if the proposed standards were rejected;[22] issue bonds in registered, as opposed to bearer, form, *see Baker*, 485 U.S. at 514; adjudicate disputes arising under federal law, *see, e.g., Testa v. Katt*, 330

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[19] *See, e.g., Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985) (upholding federal statute granting local officials discretion in spending federal funds notwithstanding state law expressly limiting that discretion); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979) (noting that state regulatory officials may be ordered to prepare rules enforcing rights under a treaty, even though "state law withholds from [state officials] the power to do so").

[20] *See, e.g., FERC*, 456 U.S. at 766 ("valid federal enactments may have an effect on state policy"); *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 57 (1912) (When Congress acted "it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature . . . .").

[21] *See, e.g., FERC*, 456 U.S. at 770 n.33 (" '[T]he determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States.' " (quoting *Hodel*, 452 U.S. at 292 n.33)); *see also Garcia*, 469 U.S. at 555 n.21.

[22] *See FERC*, 456 U.S. at 758-71. The Court premised its decision in *FERC*, in part, on the fact that "Congress could have preempted the field," *id.* at 765, which is true in the present case as well. Although the *FERC* Court observed that, as a theoretical matter, States could have avoided the federal requirements imposed by the legislation by ceasing regulation of public utilities altogether, it conceded that this was not a realistic "choice," particularly since Congress had failed to provide any "alternative regulatory mechanism to police the area in the event of state default." *Id.* at 766; *see also id.* at 781-82 (O'Connor, J., dissenting in part).

U.S. 386 (1947); extradite fugitives to a federal territory, *Branstad*, 483 U.S. at 229-30;[23] and comply with federal employment standards or guidelines, *see, e.g., EEOC v. Wyoming*, 460 U.S. 226 (1983).[24] In addition, current statutes impose federal obligations on state officials similar to those imposed by the Brady Act. These statutes range from laws requiring state law enforcement agencies to report cases of missing children to the Department of Justice, 42 U.S.C.A. § 5779(a) (West Supp. 1995), and state officers to report traffic fatalities to the Department of Transportation, 23 U.S.C. § 402(a),[25] to a statute re-

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[23] *Branstad* does not deal solely with the power to enforce constitutional mandates. To the contrary, the Court expressly rejected respondents' argument that extradition to Puerto Rico could not be ordered because Puerto Rico, as a territory, was outside the scope of the Extradition Clause. The Court instead concluded that the scope of the Extradition Clause would not matter because Puerto Rico was covered under the Extradition Act:

> It is true that the words of the Clause apply only to 'States,' and we have never held that the Commonwealth of Puerto Rico is entitled to all the benefits conferred upon the States under the Constitution. We need not decide today what applicability the Extradition Clause may have to the Commonwealth of Puerto Rico, however, for the Extradition Act clearly applies.

Id. at 229. The Court accordingly recognized Congress' power to order extradition beyond what might be required under the Constitution.

[24] *See also Ex Parte Siebold*, 100 U.S. 371, 391 (1879) (suggesting that Congress could enact national standards for weights and measures, leave inspection to state officials, and punish state officials who failed to enforce those standards with criminal sanctions).

[25] Petitioner Printz wrongly asserts that the traffic-fatality reporting requirement is tied to the receipt of federal funds. Printz Brief at 25 n.31. States are required to: (1) have a highway safety program approved by the Secretary of Transportation; and (2) collect and report data to the Secretary of Transportation. 23 U.S.C. § 402(a). Only the first duty is tied to funding. *See* 23 U.S.C. § 402(c).

quiring that States keep records on asbestos in schools, 20 U.S.C. § 4013.[26]

In sum, the Brady Act neither requires state legislation nor overburdens state officials. As such, it fits comfortably within the etiquette of federalism. The Court should decline Petitioners' invitation to recast the rules of federal-state interaction.

B. The Brady Act Is Consistent With Principles of Political Accountability.

The federal structure is designed to protect individual liberty by establishing dual sovereigns, each of which operates as a check on the exercise of the other's power. *Lopez*, 115 S. Ct. at 1638 (Kennedy, J., concurring); *New York*, 505 U.S. at 181. The federal structure can achieve this end, however, only if citizens can hold the proper sovereign politically accountable for its actions:

> If, as Madison expected, the federal and state governments are to control each other, *see* The Federalist No. 51, and hold each other in check by competing for the affections of the people, *see* The Federalist No. 46, those citizens must have some means of knowing which of the two governments to hold accountable . . . .

Lopez, 115 S. Ct. at 1638 (Kennedy, J., concurring). For this reason, the courts will intervene if an exercise

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[26] *See also, e.g.*, Superfund Amendments of 1986, 42 U.S.C. § 6991a(c) (requiring each State to make "inventories of all underground storage tanks in such State containing regulated substances . . . [and] submit such aggregated data to" a federal official); Hotel and Motel Fire Safety Act of 1990, as amended, 15 U.S.C.A. § 2224(a)(1) (West Supp. 1996) (requiring each State to submit to the Federal Government "a list of those places of public accommodation affecting commerce located in the State" that meet federal fire prevention and control guidelines); National Voter Registration Act of 1993, 42 U.S.C.A. § 1973gg-5 (West 1994) (requiring States to provide voter registration materials at state and local government offices).

of the Commerce Power causes a breakdown in the political process.[27]

In *New York*, the Court was confronted with a Congress that ducked the issues raised by low-level radioactive waste while simultaneously requiring that the States tackle those issues and adopt a state law solution. Such federal legislative maneuvering creates an unacceptable risk that the State will be held unduly accountable for the resulting policy: citizens will see the state policy but not the federal command behind it. *See* 505 U.S. at 168-69 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."). To hold the proper sovereign properly accountable under such circumstances, the public has to pierce through the state law or regulatory program that directly affects them and determine whether and to what extent the state law or regulation was mandated by the Federal Government. Federal laws that require intermediate state legislation are unconstitutional because they inevitably blur political accountability.[28]

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[27] *See New York*, 505 U.S. at 168-69; *Garcia*, 469 U.S. at 554 ("Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings of a national political process . . . ."); *cf. Reynolds v. Sims*, 377 U.S. 533, 562, 565 (1964) (noting crucial role of equal apportionment, reflected in the one person, one vote standard, in ensuring that state legislatures reflect the popular will); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("Abridgement of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."); *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (noting likelihood that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny").

[28] Contrary to the Fifth Circuit's suggestion in *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996), *New York* does not hold that all state officials must have the "choice" not to undertake a federal

The Brady Act does not have the same effect on political accountability. First, and foremost, the Act does not blur federal responsibility by requiring intermediate state legislation or regulation. It is the Act—not a state law or regulation—that requires a waiting period and a background check before purchasing a handgun. Federal law requires that prospective handgun buyers deal with a federally licensed dealer, fill out a form that is "unmistakably" federal in origin, and meet certain criteria. *See* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law*, 95 Colum. L. Rev. 1001, 1064 n.241 (1995) (hereinafter "Caminker"); *see also Frank*, 78 F.3d at 828. If a prospective purchaser of a handgun becomes aware that state officials conduct the background checks (and is not already aware that the checks are done pursuant to the Brady Act), he or she is likely to learn of the federal origin of the requirement from those officials. *See* Caminker at 1064 & n.241 (CLEOs have an incentive to explain the federal origin of the records checks). In particular, a CLEO has a special opportunity to mention the Brady Act to any disqualified purchaser who requests an explanation for his or her disqualification. *Id.*

Second, nothing in the history of the Brady Act suggests that Congress acted with an eye to avoiding political

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duty. Choice is an important element in evaluating whether a command to a legislature diminishes political accountability. The essence of a legislator's duty is to choose public policies, and the public can and does hold legislators directly accountable for those policies. *See New York*, 505 U.S. at 168; *FERC*, 456 U.S. at 785 (O'Connor, J., concurring in part and dissenting in part). Choice is a less important element in evaluating whether a command to an executive official diminishes political accountability. The essence of an executive official's role is to execute duties imposed on him or her by others—whether or not the executive official agrees with those policies. *See infra* at 20-21 (contrasting legislative and executive commandeering). The imposition of federal duties on an executive official therefore does not create a structural risk to political accountability, as a citizen must routinely look beyond an executive official to locate the accountable politician.

responsibility for the Act. *Cf. FERC*, 456 U.S. at 787 n.19 (O'Connor, J., dissenting) (noting that the Federal Government would tend to foist unpopular programs on the States in order to transfer political liability for those programs). The Act is instead a tremendous success,[29] and there is no evidence that Congress has sought to disavow its enactment. Nor has Congress shifted to the States a function that the Federal Government might perform equally well. Rather, Congress made an informed decision that during the Act's interim period, the CLEOs' access to the relevant records, particularly state criminal records, and their personal knowledge of their communities, would make them "best able to determine if the individual is disqualified to own a gun."[30] Further, Congress provided for complete federal responsibility once the program can be operated effectively by the Federal Government alone.

Third, the Brady Act has in fact already engendered political accountability. The Brady Bill was the subject of a highly visible, seven-year debate in Congress. As the Court in *New York* explained, concerns about accountability will be diminished when "the Federal Government . . . makes the decision in full view of the public." 505 U.S. at 168. The public debate over the Act has continued since its passage. For example, and contrary to the suggestion in their amicus brief, the NRA has asserted

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[29] *See, e.g.*, H.R. Rep. 103-344, at 9; 139 Cong. Rec. H9105 (daily ed. Nov. 10, 1993) (statement of Rep. Coyne); William Recktenwald & Linda Harrington, *Outrage Over Guns On Rise*, Chi. Trib., June 4, 1993, at 1 (89 percent of Americans support Brady Bill); Dennis Cauchon, *Poll: Owners Favor Gun Laws*, USA Today, Mar. 17, 1993, at 1A (88 percent of gun owners support the Brady Bill); *Does Congress Hear the Gunfire?*, Wash. Post, Mar. 5, 1993, at A20 ("Every substantive poll taken in recent years has shown [the Brady Bill] enjoys overwhelming public support."); Eric Brazil, *State Poll Supports Gun Curb, Not Ban*, S.F. Examiner, May 8, 1993, at A1 (93 percent of Californians support Brady Bill); George Gallup, Jr., *The Gallup Poll: Public Opinion 1991*, at 83 (1992) (93 percent of Americans support Brady Bill).

[30] H.R. Rep. No. 101-691, at 11 (1990); *see also supra* at 2-3 & n.4.

that voters in 1994 sought retribution against federal legislators who voted for the Brady Act.[31] The Brady Act also has had prominence in the 1996 presidential campaign. President Clinton featured the issue in his acceptance speech to the Democratic National Convention;[32] James and Sarah Brady thanked the U.S. Congress and the President for passing and signing the Brady Bill in a nationally televised speech to the Democratic National Convention;[33] President Clinton featured passage of the Brady Act in his opening statement in, and the Act was the subject of a principal question to Senator Dole during, the first presidential debate;[34] and President Clinton has made the Brady Act an important part of his campaign activities generally.[35] Because federal officials have not

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[31] *Compare* NRA Amicus Brief at 21 *with, e.g.*, John F. Persinos, *Brave Newt World: Top Pros Analyze the Midterm Election Results, Speculate About the Future*, Campaigns & Elections (Dec. 1994/Jan. 1995).

[32] *See, e.g., Hope Is Back in America*, Wash. Post, Aug. 30, 1996, at A36 (text of President Clinton's nomination acceptance speech).

[33] *See, e.g., We Can Restore Peace*, Wash. Post, Aug. 27, 1996, at A17 (text of speech by James and Sarah Brady to the Democratic National Convention); Dan Balz, *Democrats Debut With Emotional Appeal; Reeve, Brady Speeches Highlight Evening*, Wash. Post, Aug. 27, 1996, at A1.

[34] *See Campaign '96: Transcript of the First Presidential Debate*, Wash. Post, Oct. 7, 1996, at A8, A9.

[35] *See, e.g., Bill Clinton: In His Own Words*, Chi. Sun-Times, Oct. 2, 1996, at 4 (text of Clinton campaign speech); Joel Connelly & Ellis E. Conklin, *Clinton's Tour Reaches Out on Back Roads*, Seattle Post-Intelligencer, Sept. 20, 1996, at A1 ("Clinton hammered at some of those votes, notably the Brady law . . . ."); John F. Harris, *Next Stop, Campaign Heaven; Clinton Is in His Political Element on Rails*, Wash. Post, Aug. 27, 1996, at A1 (noting Clinton's use of his proposal to expand the Brady Act); Martha T. Moore, *Clinton Ad Campaign Attacks Dole's Record During His 35 Years in Congress*, USA Today, Sept. 24, 1996, at 9A (text of ad highlighting Dole vote against Brady Bill); E. Michael Myers, *Democrats Unveil Newest Attack Ad; Warns of GOP Control of Congress and White House*, Wash. Times, Aug. 16, 1996, at A13 (text of ad noting, *inter alia*, that Brady Act would not have become law had Dole been President instead of Clinton).

"remained insulated from the electoral ramifications of their decision," *New York*, 505 U.S. at 169, this Court need not intervene to protect the political process.[36]

Finally, Petitioners are mistaken in arguing that the Brady Act unconstitutionally puts them at risk of being blamed when a potential purchaser is denied a handgun. Any such risk is minuscule. As Sheriff Mack's own experience reveals, the issue rarely arises. *See* Mack Brief at 30 (during three months conducting background checks, only one disgruntled purchaser sought an explanation). The vast majority of handgun purchasers fill out the federal form and, because their purchase is approved, never encounter the CLEO. Of the minority whose purchases are disallowed, only a smaller group—those who demand an explanation—will have contact with the CLEO. Finally, the interaction between those few disgruntled potential purchasers and CLEOs provides an ideal opportunity for the CLEO to place appropriate responsibility on the Federal Government.

There is likewise little risk that a CLEO will be held accountable for the use of resources on background checks. Sheriffs (and other CLEOs) are fundamentaly unlike legislators. As Justice O'Connor explained in comparing judges and legislators, legislators are unique in that they are deemed to speak for themselves; because they have "the power to choose subjects for legislation."

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[36] Petitioner Mack's own vocal opposition to the Act illuminates how political accountability has been ensured without judicial intervention. *See* Mark Shaffer, *Gun Suit Shoots Sheriff into Spotlight: Richard Mack in Demand as Brady Act Foe*, The Ariz. Republic, July 5, 1994, at B1 (Mack "has spent virtually every weekend making speeches at pro-gun rallies around the West," has appeared "on more than 50 radio talk shows," as well as *Good Morning America* and *The Phil Donahue Show*, and appears on t-shirts sold at local handgun stores.). Sheriff Mack has even written a book sharing his views about handgun control. *See* Richard I. Mack & Timothy R. Walters, *From My Cold Dead Fingers: Why America Needs Guns!* (1994) (focusing on his opposition to the Brady Act and the federal government's alleged conspiracy to suppress individual rights).

FERC, 456 U.S. at 785 (O'Connor, J., concurring in part and dissenting in part). Sheriffs, like judges, routinely do not have the power to choose their own subjects. *See id.* at 784-85. Sheriffs are bound to execute duties imposed on them by statutes written without their approval. They are held accountable not for the substance of those duties, but for the skill and diligence with which the duties are performed, regardless of their source.[37]

II. THE FRAMERS CONTEMPLATED THAT CONGRESS COULD REQUIRE STATE AND LOCAL OFFICIALS TO IMPLEMENT FEDERAL LAW.

The historical record demonstrates that the Framers intended that Congress have the power to "commandeer state executives and state courts, but not state legislatures, to help implement its constitutional powers."[38] Indeed, the very sentence of Alexander Hamilton cited in *New York* to establish the Framers' intention that the Federal Government "'must stand in need of no intermediate legislations,'" *New York*, 505 U.S. at 163 (citation omitted), explains that the Federal Government "must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions." *The Federalist No. 16*, at 165 (Hamilton).[39]

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[37] *See, e.g.*, "Voters Reject Sheriff Who Challenged Brady Gun Law," AP, Sept. 12, 1996, *available in* WESTLAW, ASSOCPPS database (explaining Sheriff Mack's recent election loss as a reaction to his lack of diligence in pursuing, rather than the content of, his law enforcement duties); Tony Mauro, *Mack Attack*, Legal Times, Sept. 30, 1996, at 10 (same).

[38] Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957, 1962 (1993) (hereinafter "Prakash"); *see also* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633 (1993) (hereinafter "Powell"); Samuel H. Beer, *To Make A Nation: The Rediscovery of American Federalism* 252 (1993) (hereinafter "Beer").

[39] The "magistracy" included state executive and judicial officers. *See Prakash* at 1961 n.26; *see also Gordon v. Hobart*, 10 F. Cas. 795, 796 (C.C.D. Me. 1836) (No. 5609) (Story, J.); *The Federalist No. 16*, at 166 (Hamilton); *The Federalist No. 47*, at 337-38 (Madison).

The Framers indicated on numerous occasions that the state magistracy might be called upon to implement federal law.[40] Indeed, those who supported ratification of the Constitution emphasized this intention in order to reassure those who feared that the Constitution would displace local authority and bring unfamiliar federal officials into their towns and communities. Alexander Hamilton, for example, assuaged concern that federal tax collectors would be ignorant of "local details," by observing that "[t]he national legislature can make use of the *system of each State within that State*" for laying and collecting taxes.[41] James Madison, addressing the same apprehension, noted that "it is extremely probable, that . . . officers of the States will be clothed with the correspondent authority of the Union" and that "the eventual collection [of internal taxes], under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States." *The Federalist No. 45*, at 328 (Madison).[42]

The Framers' vision of a cooperative federalism extended beyond the collection of taxes. Hamilton explained that the fledgling Federal Government would earn the respect of the citizenry by borrowing the prestige of the States. Because the Constitution "will enable the government to *employ the ordinary magistracy of each [of the States], in the execution of its laws*," the Federal Government will enjoy "the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State." *The Federalist No. 27*, at 221

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[40] *See* Prakash at 1990-2032; Powell at 659-64.

[41] *The Federalist No. 36*, at 261 (Hamilton) (emphasis in original); *see also id.* at 263 ("the probability is, that the United States will . . . make use of the State officers and State regulations for collecting [federal taxes]").

[42] Madison expected the new Federal Government to govern through the state governments in a manner similar to the way the New England states governed through local governments. Beer at 252.

(Hamilton) (emphasis added).[43] In the absence of a substantial federal administrative apparatus, the Federal Government's power to use state officers necessarily was central to the Framers' conception of a national government "capable of regulating the common concerns." *The Federalist No. 16*, at 165 (Hamilton).

Even those who opposed the Constitution understood that it allowed for federal commandeering of state officials. Indeed, Patrick Henry warned that "[t]he sheriff comes to-day as a state collector" and the next day as a "federal" collector. 3 *Debates* 168 (Jonathan Elliot ed., 1836). Similarly, in a rejoinder to the Federalists, Agrippa acknowledged that "[a]ll the state officers are . . . bound by oath to support this constitution," and, by operation of the Supremacy Clause, are bound "to execute the continental laws in their own proper departments within the state." Letter from Agrippa to the People (Dec. 11, 1787), *reprinted in* 4 *The Complete Anti-Federalist* 78 (Herbert J. Storing ed., 1981).

Early Congresses, moreover, relied on state and local officials to assist in the application of federal law. Thus, in enacting the Naturalization Act of 1790, the very same Congress that adopted the Tenth Amendment imposed certain ministerial duties on state court clerks.[44] Shortly

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[43] In particular, Hamilton believed that local law enforcement officers could be used to enforce federal regulations. In *The Federalist No. 16*, Hamilton explains that "[i]f opposition to the national government should arise from the disorderly conduct of refractory or seditious individuals, it could be overcome by the same means which are daily employed against the same evil under the State governments. The magistracy, being equally the ministers of the law of the land, from whatever source it might emanate, would doubtless be ready to guard the national as the local regulations from the inroads of private licentiousness." *The Federalist No. 16*, at 166 (Hamilton).

[44] Naturalization Act, ch. 3, § 1, 1 Stat. 103 (1790). The Act provided that an alien eligible for citizenship may apply to "any common law court of record" in a State where he has lived for one year "and the clerk of such court *shall* record such application, and the proceedings thereon." *Id.* at 103-04 (emphasis added).

thereafter, Congress enacted statutes requiring that "the executive authority of any . . . state or territory to which [a fugitive from justice] shall have fled" return the fugitive to the State from which he fled upon demand from the executive of that State or territory;[45] that state courts "cause" the apprehension of certain aliens—presumably through the local sheriffs;[46] and that the local justices of the peace, upon application by a ship's captain, gather local citizens skilled in maritime affairs and decide, with the citizens' assistance, whether and how a ship of uncertain seaworthiness might be repaired before continuing its voyage.[47] Petitioners' broad argument that the Federal Government may never look to state or local officials to implement federal law cannot be reconciled with either the Framers' vision or these early enactments.[48]

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[45] Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302. The obligation imposed on state executives under this legislation exceeded the similar obligation established in art. IV, § 2 of the Constitution, which does not extend to demands made by territories. *See Puerto Rico v. Branstad*, 483 U.S. 219, 229 (1987); *supra* note 23.

[46] Alien and Sedition Act, ch. 66, § 2, 1 Stat. 577 (1798) ("it shall be the duty of the several courts of the United States, and of each state, having criminal jurisdiction . . . to cause [aliens targeted by the statute] to be duly apprehended").

[47] Act of July 20, 1790, ch. 29, § 3, 1 Stat. 131, 132. The duties imposed on the justices of the peace under this statute, like those imposed by the statutes discussed *supra* relating to judicial branch officials, were more executive than judicial in nature. In fact, Section 7 of this statute was affirmed, against a challenge that it unconstitutionally delegated "the judicial power of the United States" to a state officer, because the duties assumed by the state justices of the peace were not those traditionally performed by courts. *See Robertson v. Baldwin*, 165 U.S. 275, 279 (1897). Early federal statutes requiring executive or administrative acts by state officials are collected at Caminker at 1045 & nn. 170-177.

[48] *See also* Act of Mar. 8, 1806, ch. 14, § 1, 2 Stat. 354 (requiring district attorneys of New York and Pennsylvania to appoint a state official to prosecute violations of federal revenue laws). Representative Elbridge Gerry summarized the perspective that led to these statutes when he stated:

> [N]othing could be plainer than this—that the General Government had a right to require the assistance of the officers

III. THE CHALLENGED PROVISIONS OF THE BRADY ACT ARE SEVERABLE.

Although Petitioners challenge only three provisions of the Brady Act, they seek to strike down all of the Act's interim provisions on the ground that they cannot be severed from the remainder of the Act. As every court faced with the issue has found, however, the unchallenged provisions are severable.[49]

To begin with, the Brady Act is severable because of the severability clause of the Gun Control Act of 1968, which the Brady Act amends.[50] A severability clause applies to a subsequent amendment of an Act. *See, e.g., Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977). Where such a clause exists there is "a presumption that Congress did not intend the validity of the Act as a whole, or any part of the Act, to depend upon whether the [provision in question] was invalid." *INS v. Chadha*, 462 U.S. 919, 932 (1983); *see also Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 434 (1938).[51]

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of the several State Governments; for they have severally taken an oath to support the Constitution of the United States. *History of Congress*, House, Apr. 25, 1792, at 579 (Gales & Seaton 1849).

[49] *See Koog v. United States*, 79 F.3d 452 (5th Cir. 1996); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994); *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994); *Romero v. United States*, 883 F. Supp. 1076 (W.D. La. 1994).

[50] The Handgun Control Act provides that "[i]f any provision of this chapter or the application thereof to any person or circumstances is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby." 18 U.S.C. § 928.

[51] There is no merit to Petitioner Printz's claim that the severability clause in the Handgun Control Act does not apply to the Brady Act. Printz attempts to analogize the Brady Act's severability clause to the severability clause discussed in *Alaska Airlines*,

Even absent the severability clause, the unchallenged portions of the Brady Act would be severable. This Court repeatedly has declared that "[a] court should refrain from invalidating more of the statute than is necessary." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (internal quotation and citations omitted). As such, if the unobjectionable provisions of an act are "separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Id.* (internal quotation and citations omitted). In accord with this strong preference for severability, the standard for determining the severability of an unconstitutional provision is high:

> Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Id. (internal quotation and citation omitted).

Here, it is clear that the unchallenged provisions of the Brady Act would be "fully operative as a law." Under the unchallenged provisions, prospective handgun purchasers still would be required to provide certain information to dealers, dealers still would be required to share that information with CLEOs, and, unless the relevant CLEO performed the background check sooner, each prospective purchaser still would be required to wait five business days before purchasing a handgun. The only difference would be that CLEOs, instead of being compelled

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Inc. v. Brock, 480 U.S. 678, 686 n.8 (1987). In that case, this Court noted, in dicta, that the application of the FAA's severability clause to the Employee Protection Program ("EPP") was "doubtful" because the EPP, which was enacted as part of the Airline Deregulation Act of 1978, did not amend the FAA but instead established an entirely new program. *Id.* The Brady Act, in contrast, clearly amended the Handgun Control Act rather than creating a new program, as the purpose of the Act is to add a means of enforcing the prohibitions already set forth in the Handgun Control Act.

to perform a background check, would have the option and opportunity to do so.

The opportunity to conduct checks is particularly meaningful because the overwhelming majority of the law enforcement community, including members of the amici organizations, are eager to perform background checks.[52] As the International Association of Chiefs of Police told Congress, "compelled or not, we in law enforcement management want to conduct the background checks."[53] The unchallenged provisions would result in background checks in an overwhelming majority of jurisdictions, and so function in a way completely consistent with the aims of the Brady Act.[54]

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[52] The overwhelming support of law enforcement for the Brady Act is evidenced not only by the participation of the national law enforcement groups in this brief, but also by the congressional testimony of police groups in favor of the Brady Act. *See, e.g., The Brady Handgun Violence Prevention Act: Hearing on S. 1236 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 101st Cong. 65-72 (1989) (statement of John Dineen, National Fraternal Order of Police, representing over 203,000 professional police officers nationwide); *Brady Handgun Violence Prevention Act: Hearing on H.R. 7 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 78-81 (1991) (statement of Lee Brown, Commissioner, New York City Police Dep't); *id.* at 112-14 (statement of Kenneth Collins, Chief of Police, Maplewood Minn. and President, Minnesota Ass'n of Chiefs of Police).

[53] *Hearing on H.R. 1025*, at 207 (statement of David B. Mitchell, Chief of Police, Prince Georges County Police Dep't, Palmer Park, Md., on behalf of the International Ass'n of Chiefs of Police).

[54] Contrary to another of Petitioner Printz's contentions, a voluntary system would not transform the waiting period from a maximum of five business days into a mandatory five business days. Nothing in the unchallenged provisions would prevent a CLEO from performing the background check in less than five business days and thereby shortening the waiting period. In addition, the waiting period would continue to serve the independent purpose of providing a "cooling off" period to prevent the sale of firearms for use in crimes of passion. *See* 139 Cong. Rec. H9089 (daily ed. Nov. 10, 1993) (statement of Rep. Derrick); *id.* H9106 (statement